United Cerebral Palsy of New York City *and* Local 2, United Federation of Teachers, American Federation of Teachers, AFL–CIO. Case 29–CA–26927

July 27, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On December 7, 2005, Administrative Law Judge Howard Edelman issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint in this case alleges that the Respondent violated Section 8(a)(5) and (1) of the Act: (1) by distributing to employees a handbook that changed their terms and conditions of employment without notifying or bargaining with the Union, and (2) by direct dealing with employees by requiring them to sign a statement agreeing to comply with the handbook and acknowledging that they understand that the Respondent may make future changes without providing advance notice. The judge found, in agreement with the Respondent, that the case was suitable for deferral under *Collyer Insulated Wire*, 192 NLRB 837 (1971). Contrary to the judge we find, in agreement with the General Counsel, that deferral is not warranted and that, on the merits, the Respondent violated Section 8(a)(5) and (1) of the Act as alleged.

Facts

The Respondent provides services to individuals with cerebral palsy and other disabilities. On August 21, 2000, following a representation election, the Board certified the Union as the representative of medical assistants and support personnel at the Respondent's Lawrence Avenue facilities (Lawrence Avenue unit). In addition, on April 5, 2002, the Board certified the Union as the representative of program specialists and other employees working in the Respondent's residential programs (Residences unit). The Respondent and the Union thereafter entered into collective-bargaining agreements for both units, effective from May 15, 2003 through August 28, 2005. Although the two units are covered by separate agreements, these agreements are largely identical. Both collective-bargaining agreements contain comprehensive work rules and other terms and conditions of employment.

On April 1, 2005, the Respondent distributed an employee handbook to employees working at both the Lawrence Avenue and residential locations. The handbook was issued to both unit and nonunit employees, with unit employees receiving a copy specifically designated for "unionized" employees. The Respondent gave no advance notice to the Union of its intent to issue the handbook, nor did it negotiate over any handbook provisions that differed from terms and conditions specified in the collective-bargaining agreements.

In its introductory section, entitled "About this Handbook," the handbook states the following:

> This handbook supersedes all previous UCP/NYC Employee Handbooks, management memoranda and practices that may have been issued on subjects covered in the Handbook or in effect at UCP/NYC and is intended to incorporate individual policies that will be issued in the future. In case of a conflict among individual UCP/NYC policies, the Agency's most recently issued policy will control.

The handbook thereafter sets forth a complete set of work rules. The policies listed in the handbook depart from those in the collective-bargaining agreements in the following areas:

1. Vacations:[1] The collective-bargaining agreements require that employees who wish to use accumulated vacation time must submit a written leave request in advance to their supervisor. The collective-bargaining agreements also state that, when considering such requests, supervisors will take into account employee preference and agency need, but that if the Respondent is unable to accommodate all vacation requests, it will follow, "an equitable rotation among Employees in the same title . . . based on UCP service. The most senior employee who did not receive his/her preference in the preceding vacation period shall be granted preference in the subsequent vacation period."

The relevant handbook provision states that employees shall submit a written leave request to their supervisor, and that supervisors will make "every effort to consider employee preferences while meeting any agency needs." However, the handbook does not provide for the seniority-based selections, as outlined above, in the event that

[1] The relevant provisions appear in art. 10 of the collective-bargaining agreements and on pp. 21–22 of the handbook in the section entitled "Hours of Work."

the Respondent is unable to approve all vacation requests.

2. Holiday leave:[2] The collective-bargaining agreements list the following as floating holidays: New Year's Day, Martin Luther King Day, President's Day, Good Friday, Memorial Day, Independence Day, Labor Day, Yom Kippur (weekday only), Presidential Election Day, Thanksgiving Day, Friday after Thanksgiving, and Christmas Day. The handbook also contains a list of floating holidays. That list, however, does not include Presidential Election Day.

3. Hours of work:[3] The collective-bargaining agreements contain a number of provisions governing hours of work. In the event that certain work requires the Respondent to change employees' work schedules or shifts, the collective-bargaining agreements require the Respondent to first seek volunteers to perform the work. If there are insufficient volunteers, the collective-bargaining agreements require that the Respondent first change the schedule of the least-senior employee. Further, in the event that an employee's shift is involuntarily changed, the collective-bargaining agreements give that employee the right to return to his/her previous schedule if such a position opens up within 1 year of the involuntary change.

By contrast, the handbook states that "Work schedules are regularly subject to change based on program needs. Efforts will be made to discuss any changes sufficiently in advance to give an employee time to make any necessary arrangements." The handbook includes no language requiring the Respondent to seek volunteers to cover a shift, to base involuntary schedule changes on seniority, or to allow employees affected by an involuntary schedule change the right to return to their original shifts if an opening occurs within 1 year of the change.

4. Posting vacancies:[4] The collective-bargaining agreements require that the Respondent "post vacancies for bargaining unit positions for at least five days." By contrast, the handbook's provision on vacancies includes no similar posting requirement, and states only that "every effort will be made to advise employees of promotion and transfer opportunities that become available within the Agency through job posting."

5. Transfers within the unit/transfers out of the unit:[5] As with involuntary shift changes, the collective-bargaining agreements require that, before making an involuntary transfer, the Respondent must first seek volunteers. If there are no qualified volunteers, the collective-bargaining agreements require the Respondent to transfer the least-senior employees first, and to allow involuntarily-transferred employees to transfer back as soon as practical. The collective-bargaining agreements also provide that employees transferred out of the bargaining unit will suffer no reduction in fringe benefits.

The handbook states only that "UCP/NYC reserves the right to determine all assignments and reassignments of employees based on the needs of the program participants and of the Agency." It does not require that the Respondent: seek volunteers before involuntarily transferring employees, transfer the least-senior employees first, permit transferred employees to return to the unit, or preserve fringe benefits for employees transferred out of the unit.

6. Discipline and discharge:[6] The collective-bargaining agreements provide that the Respondent shall have the right to "discharge, suspend or discipline any Employee for just cause." By contrast, the handbook reserves to the Respondent the right to discipline any employee for behavior "deemed inappropriate by the Agency." There is no mention in the handbook of just cause as a prerequisite for discipline.

7. Grievance and arbitration procedure:[7] The grievance procedure under the collective-bargaining agreements is initiated by the employee's submission of a grievance form to the Union. The submission of that form initiates a 3-step process by which an employee's grievance is submitted to the Respondent's designee (step 1). If the grievance is denied, the employee may appeal to the Respondent's executive director (step 2) and, if the appeal is denied, the employee may take the grievance to arbitration.

[2] The relevant provisions appear in art. 11 of the collective-bargaining agreements, and on p. 23 of the handbook in the section entitled "Holiday Leave."

[3] At issue here are the "Hours of Work" provisions listed as art. 20(A)(5) of the Residences collective-bargaining agreement and art. 21(6) of the Lawrence Avenue collective-bargaining agreement. The handbook's provision appears on p. 15 in the section entitled "Working Hours and Schedules."

[4] This provision is set forth in art. 21(A) of the Residences collective-bargaining agreement and art. 22(A) of the Lawrence Avenue collective-bargaining agreement. The relevant provision in the handbook appears on p. 29, in the section entitled "Promotions and Transfers."

[5] These provisions are set forth in art. 21(D) of the Residences collective-bargaining agreement and art. 22(D) of the Lawrence Avenue collective-bargaining agreement. The relevant handbook provision appears on p. 20 in the section entitled "Promotions and Transfers."

[6] This provision appears in the due process section of the collective-bargaining agreements, which is art. 22 in the Residences collective-bargaining agreement and art. 23 of the Lawrence Avenue collective-bargaining agreement. The relevant handbook provision appears on p. 39 in the "Codes of Conduct" section.

[7] These provisions appear in art. 23 of the Residences collective-bargaining agreement and art. 24 of the Lawrence Avenue collective-bargaining agreement. The relevant handbook provision appears on p. 44 in the section governing "Grievance Policy and Procedure."

The handbook states that, prior to filing a grievance, employees must first consult with their supervisor, and then with the Respondent's program director. Only after completing these two steps can an employee proceed to the contractual grievance procedures. The collective-bargaining agreements do not include any similar requirement.

8. Personnel files:[8] The collective-bargaining agreements provide that "Each Employee shall have free access (which shall not be abused) to his/her file for the purpose of examination and making copies of materials within the file." The handbook's section requires that a human resources representative be present while employees examine their personnel files. The handbook also includes a provision, not found in the collective-bargaining agreements, allowing employees to add statements to their personnel files.

9. Separation from employment:[9] The collective-bargaining agreements require employees to give 2 (for "non-exempt" employees) or 4 weeks' (for "exempt" employees) written notice prior to voluntarily terminating their employment. Employees who do not abide by this provision may forfeit accrued but unused vacation pay. The collective-bargaining agreements also state that an employee may receive an exception from the notice requirement in cases of hardship. The handbook's section governing separation from employment similarly requires 2 or 4 weeks' notice to avoid forfeiture of unused vacation pay, but it includes no hardship exception.

10. Absences: The handbook's section on attendance and punctuality, on page 18, states that "Employees may be asked to submit medical documentation for any absence due to illness, and non-medical documentation for non-medical absences." The collective-bargaining agreements do not include a similar requirement.

11. The handbook also includes a provision reserving to the Respondent the right to change its terms and conditions of employment at any time, without notice:

> UPC/NYC's personnel policies, practices and benefits are periodically reviewed and are subject to change. The Agency may change, cancel or suspend any of its personnel policies at anytime [sic] without advance notice, although where and when practical, UPC/NYC will notify employees of significant changes through Administrative Memoranda or by another means.

In addition, upon receiving the handbook, the Respondent required that employees sign a receipt certifying that:

> I realize that it is my responsibility to become familiar with the Handbook, to comply fully with the policies and procedures contained in the Handbook and that such policies may be revised from time to time, with or without prior notice to me. I further realize that if there is a conflict between one or more Agency policies, the most recently issued policy will apply.

The Judge's Findings

The judge found that this case was appropriate for deferral under *Collyer*, supra. In so finding, the judge rejected the General Counsel's contention that the Respondent's unilateral changes, as set forth in the handbook, amounted to a rejection of the collective-bargaining agreements. Although the judge acknowledged that the handbook's change of the grievance procedure was "troubling," he found that it nonetheless did not amount to a rejection of the collective-bargaining agreements. The judge's analysis of the deferral issue did not address the General Counsel's direct-dealing allegation. Having concluded that deferral was appropriate, the judge did not reach the merits of this case.

Contrary to the judge, and for the reasons set forth below, we find that this case is not appropriate for deferral. We also find, on the merits, that the Respondent violated Section 8(a)(5) and (1) of the Act by making the alleged unilateral changes to mandatory subjects of bargaining and by directly dealing with employees.

Discussion

Under *Collyer*, supra, and *United Technologies Corp.*, 268 NLRB 557, 558 (1984), the Board will defer unfair labor practice allegations to arbitration where: (1) the dispute arose within the confines of a long and productive bargaining relationship; (2) there is no claim of employer animosity to the employees' exercise of protected statutory rights; (3) the parties' agreement provides for arbitration of a very broad range of disputes; (4) the arbitration clause clearly encompasses the dispute at issue; (5) the employer has asserted its willingness to utilize arbitration to resolve the dispute; and (6) the dispute is eminently well suited to such resolution.

As to whether a dispute is well suited to resolution through arbitration, the Board will defer where the dispute "aris[es] over the application or interpretation of an existing collective-bargaining agreement." *Commercial Cartage Co.*, 273 NLRB 637, 640 (1984), quoting *Col-*

[8] These provisions appear in art. 24 of the Residences collective-bargaining agreement and art. 25 of the Lawrence Avenue collective-bargaining agreement. The section on employee files appears on p. 13 of the handbook.

[9] These provisions appear in art. 26 of the Residences collective-bargaining agreement and art. 27 of the Lawrence Avenue collective-bargaining agreement. The handbook's provision on separation from employment appears on p. 20.

lyer, 192 NLRB at 840. Where, however, an employer's actions amount to a repudiation of the contract or strike at the very heart of the collective-bargaining relationship, deferral is not appropriate. Id. at 641. Thus, the Board has stated that it will not defer in instances where the respondent's "conduct constitutes a rejection of the principles of collective bargaining." *Kenosha Auto Transport Corp.*, 302 NLRB 888 fn. 2 (1991).[10] In those instances, "[i]t is unlikely that an arbitrator, whose function is limited to problems of contractual interpretation, would resolve or remedy, if necessary, allegations of statutory wrongs, or address such issues as the Union's status as a labor organization and authorized collective-bargaining representative in accordance with the Act or Board precedent." *Postal Service*, 302 NLRB 767, 774 (1991); *Rappazzo Electric Co.*, 281 NLRB 471 fn. 1 (1986); *AMF Inc.*, 219 NLRB 903, 912 (1975).[11]

Applying the principles set forth above, we find that the Respondent's conduct in the instant case amounts to a rejection of the collective-bargaining process and, as such, deferral is not appropriate. Although the handbook does not explicitly repudiate the collective-bargaining agreements, it clearly states that it supersedes all other "handbooks, management memoranda and practices" on any matter also covered by the handbook. The practices established by the collective-bargaining agreements are clearly encompassed by that broad language. Further, as set forth in the facts recited above, the handbook encompasses many matters that are covered by the contract. Finally, to the extent that the handbook encompasses matters that are not covered by the contract, it nonetheless deals with mandatory subjects of bargaining. The handbook thus conveys to employees that they can no longer rely on the collective-bargaining agreements or the collective-bargaining process with respect to the terms and conditions of their employment.

The Respondent's rejection of the collective-bargaining relationship is further evidenced by the handbook's provision reserving to the Respondent the right to "change, cancel or suspend any of its personnel policies at anytime without advance notice." By this statement, the Respondent effectively announced that it was no longer bound by the collective-bargaining agreements and that it no longer intended to bargain over terms and conditions of employment prior to making such changes. Indeed, the Respondent has not only declared that it reserves the right to make changes without prior notice, it has required individual employees to acknowledge, in writing, their understanding and acceptance of the Respondent's declaration. We therefore find that this case involves more than mere changes to some terms of the collective-bargaining agreements; it involves allegations of conduct amounting to a de facto rejection of the bargaining relationship between the Respondent and the Union. We therefore reverse the judge's finding that deferral is appropriate.[12]

Accordingly, we now turn to the substantive allegations of this case.

The 8(a)(5) Allegations

A. The Handbook Provisions

It is well established that an employer violates Section 8(a)(5) and (1) of the Act if it makes material unilateral changes during the course of a collective-bargaining relationship on matters that are mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962). As explained below, we find that the Respondent's handbook made a number of significant unilateral changes to mandatory subjects of bargaining:

1. The handbook unilaterally changes the Respondent's vacation policy by eliminating seniority as a consideration in granting vacation requests. We find this to be a material change in a mandatory subject of bargaining. In *Blue Circle Cement Co.*, 319 NLRB 954 (1995), enfd. mem. in relevant part 106 F.3d 413 (10th Cir. 1997), the Board found that an employer's unilateral change in its vacation scheduling from a system based on seniority to one based on the allocation of vacation slots by department involved a mandatory subject of bargaining and therefore violated the Act. We find that the Respondent's unilateral elimination of seniority in vacation scheduling similarly implicates a mandatory subject of bargaining and therefore violates Section 8(a)(5) and (1) of the Act as alleged.

2. The Respondent's handbook eliminated Presidential Election Day from the list of paid floating holidays. It is well settled that an employer's unilateral change to the

[10] For example, the Board has refused to defer where an employer denied that it was bound by the collective-bargaining agreement whose applicability to the dispute was central to the controversy. See, e.g., *Rappazzo Electric Co.*, 281 NLRB 471, 478 (1986); *Mountain State Construction Co.*, 203 NLRB 1085 (1973), enfd. mem. 510 F.2d 966 (4th Cir. 1975).

[11] In other cases, the Board has refused to defer where an employer's unilateral action constitutes more than "a mere breach of the contract, but amounts, as a practical matter, to the striking of a death blow to the contract as a whole, and is thus, in reality, a basic repudiation of the bargaining relationship." *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), enfd. mem. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975) (Board refused to defer allegation that employer unilaterally lowered employees' wages, because wage rate provision was a pivotal contract term, and thus repudiation of that term amounted to repudiation of the contract as a whole).

[12] Having found that this case is not well-suited to arbitration, we find that it is unnecessary to pass on whether the other deferral criteria set forth in *Collyer* are satisfied in this case.

list of holidays that it observes implicates a mandatory subject of bargaining. See, e.g., *E. I. du Pont & Co.*, 259 NLRB 1210, 1211 (1982) (finding that the employer violated the Act by unilaterally establishing an additional paid holiday without bargaining with the union). We therefore find that the Respondent violated the Act by unilaterally removing this holiday from the list of observed holidays.

3. The Respondent's handbook eliminated several procedures utilized when making involuntary schedule changes. It is well established that issues affecting employee schedules constitute mandatory subjects of bargaining. *Meat Cutters, Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965) (noting that "the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain"). Here, the Respondent's handbook fails to include several key provisions relating to involuntary schedule changes that were included in the collective-bargaining agreements. Omitted from the handbook's section on involuntary schedule changes are the requirements that the Respondent first seek volunteers, that the Respondent use seniority as a basis for selecting candidates for involuntary schedule changes, and that involuntarily-transferred employees receive preference to return to their former shifts. The omission of these procedures in the handbook's discussion of involuntary schedule changes constitutes a significant unilateral change in violation of Section 8(a)(5) and (1).

4. The handbook's provision on promotions and transfers does not include the collective-bargaining agreements' provisions requiring that the Respondent post vacancies of unit positions for at least 5 days. The Board has found that unilateral changes to procedures by which employers post vacancies violate Section 8(a)(5) of the Act. See *U.S. Ecology Corp.*, 331 NLRB 223, 227–228 (2000), enfd. 26 Fed. Appx. 435 (6th Cir. 2001) (finding that an employer's posting of position openings without consulting with the Union, as required by the contract, violated Section 8(a)(5) of the Act). Here, the Respondent's handbook substantially alters its vacancy announcement policy by not including the contractual posting requirement. The unilateral elimination of the posting requirement violated Section 8(a)(5) and (1) of the Act as alleged.

5. We also find that the Respondent violated the Act by unilaterally eliminating seniority as a consideration when selecting employees for involuntary transfers. Such changes affecting employee transfers implicate mandatory subjects of bargaining. See generally *Indulac, Inc.*, 344 NLRB No. 133 (2005) (finding that transferring an employee without bargaining is an unlawful unilateral change). Here, as with the rules governing involuntary schedule changes discussed above, the handbook's policy for involuntary transfers fails to include several significant provisions included in the collective-bargaining agreements. Specifically, the handbook's policy on involuntary transfers does not include the requirements that the Respondent first seek volunteers, that the Respondent consider seniority in selecting employees for involuntary transfers, that transferred employees be given priority to return to their former positions, and that employees transferred out of the unit not lose their fringe benefits. The omission of these requirements fundamentally changed the transfer policy, and thus violated Section 8(a)(5) and (1).

6. The Respondent's handbook changes its disciplinary policy from a policy that gives the Respondent the right to suspend or discipline employees for cause to a policy that gives the Respondent the right to discipline employees for conduct "deemed inappropriate by the Agency." Thus, under the handbook's policy, the Respondent need not show the existence of just cause to discipline or suspend employees, as the collective-bargaining agreements require. It is well established that rules governing the imposition of employee discipline are mandatory subjects of bargaining. See *Toledo Blade Co.*, 343 NLRB No. 51 (2004) (finding that an employer's unilateral decision to depart from its progressive disciplinary system and decide issues of discipline on a case-by-case basis violated the Act). We therefore find that, by unilaterally changing the just cause provision in its disciplinary policy, the Respondent violated Section 8(a)(5) and (1) of the Act.

7. The Respondent's handbook adds a new requirement to the grievance procedure. Specifically, the handbook's grievance procedure requires that employees must first discuss potential grievances with a supervisor, and then with the Respondent's director of human resources, before filing a grievance with the Union. The collective-bargaining agreements include no such requirements. The Board has found that unilateral changes to the process by which employees file grievances implicate mandatory subjects of bargaining. *Arizona Portland Cement Co.*, 302 NLRB 36, 43 (1991) (finding that an employer's substitution of a dispute resolution policy for its existing grievance-processing system constituted an unlawful unilateral change). We therefore find that the Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally changing its grievance procedure.

8. The Respondent's handbook changes the contract's absenteeism policy by stating that the Respondent may

require documentation of both medical and nonmedical absences. The collective-bargaining agreements do not include provisions allowing the Respondent to require documentation of absences. The Board has previously found that changes to an employer's leave policies, such as requiring documentation of absences, violates the Act. See *Bethea Baptist Home*, 310 NLRB 156, 188–189 (1993) (unilaterally changing sick leave policy to require a physician's statement found to be unlawful). We therefore find that by implementing this provision through its handbook, the Respondent unilaterally changed its absenteeism policy in violation of Section 8(a)(5) and (1) of the Act.

9. Finally, the Respondent's handbook violates the Act by reserving to the Respondent the right to make future changes without notice. As noted above, the handbook's preface states that: "UPC/NYC's personnel policies, practices and benefits are periodically reviewed and are subject to change. The Agency may change, cancel or suspend any of its personnel policies at anytime [sic] without advance notice." As evidenced by the unilateral changes outlined above, these "policies, practices and benefits" encompass mandatory subjects of bargaining. In *Heck's, Inc.*, 293 NLRB 1111 (1989), the Board found that a similar handbook provision[13] was unlawful because it "disparages the collective-bargaining process and improperly undermines the status of the Union as the designated and recognized collective-bargaining representative of [the employer's] employees." Id. at 1118. We therefore find that the Respondent violated Section 8(a)(5) and (1) of the Act by its purported reservation of the right to make future changes to terms and conditions of employment without prior notice.

B. The Direct-Dealing Allegation

It is undisputed that the Respondent required employees to sign a receipt acknowledging that they had received the handbook and that they agreed to comply with its terms. The General Counsel argues that, by this conduct, the Respondent has engaged in unlawful direct dealing.[14] We agree.

An employer's attempt to bypass the union and bargain directly with employees constitutes a violation of Section 8(a)(5) and (1) of the Act. See, e.g., *Heck's, Inc.*, supra at 1120 (finding that an employer's requirement that employees sign an antiunion statement constituted unlawful direct dealing). Here, the language of the receipt the Respondent required employees to sign essentially requires the employees to agree that the Respondent may unilaterally change terms and conditions of employment. Specifically, it states that "it is my responsibility to become familiar with the Handbook, to comply fully with the policies and procedures contained in the Handbook and that such policies may be revised from time to time, with or without prior notice to me. I further realize that if there is a conflict between one or more Agency policies, the most recently issued policy will apply." Thus, by taking its changes directly to its employees, requiring them to agree to those changes, and also requiring them to agree that the Respondent could make future changes without prior notice, the Respondent bypassed the Union and dealt directly with its employees. *Heck's, Inc.*, supra at 1120. We therefore find that this conduct violates Section 8(a)(5) and (1) of the Act as alleged.

In sum, we find that deferral to arbitration is not appropriate in this case. We further find that by distributing the handbook to employees, the Respondent violated Section 8(a)(5) and (1) of the Act by making unilateral changes in terms and conditions of employment, and by directly dealing with its employees.[15]

ORDER

The National Labor Relations Board orders that the Respondent, United Cerebral Palsy of New York City, Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making unilateral changes to the following terms and conditions of employment which differ from those set forth in the 2003–2005 collective-bargaining agreements: (i) vacation scheduling policy; (ii) floating holidays; (iii) involuntary schedule changes; (iv) vacancy posting; (v) involuntary transfers; (vi) discipline or discharge for cause; (vii) grievance and arbitration procedures; (viii) employees' access to their personnel files;

[13] In *Heck's*, as in this case, the employer circulated a handbook that set forth comprehensive work rules and made a number of unilateral changes to working conditions. In addition, employees were required to sign a statement that said, "I understand that the company reserves the right to make changes in the guidelines or their application as it deems appropriate."

[14] The judge did not address this allegation.

[15] We grant the General Counsel's request that the Respondent be ordered to rescind the entire handbook designated for unionized employees, rather than only those portions of the handbook that unilaterally change provisions of the collective-bargaining agreement. As in *Heck's, Inc.*, supra, 293 NLRB at 1121, the Respondent required employees, without union participation, to agree in writing that the Respondent was permitted to make unilateral changes to employees' terms and conditions of employment, not only in the initial version of the handbook but also on an ongoing basis, and that the employees would be bound by any policies established through such unilateral action. Comparable assertions were found in the handbook's introduction. We thus conclude that only the rescission of the entire handbook will fully remedy the Respondent's unlawful conduct.

(ix) separation from employment; and (x) documentation of absences.

(b) Reserving to itself the right to make future changes in terms and conditions of employment without notice to or bargaining with the Union.

(c) Dealing directly with unit employees with respect to their terms and conditions of employment as long as the employees are represented by the Union for the purpose of collective bargaining within the meaning of the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, at the Lawrence Avenue and Residences locations, rescind the entire employee handbook designated for the Respondent's unionized employees.

(b) Within 14 days from the date of this Order, remove from its files any statements signed by employees in which they agree to comply fully with the policies and procedures in the handbook and acknowledge that the Respondent may revise such policies without prior notice, and within 3 days thereafter notify the employees in writing that this has been done and that the statements will not be used against them in any way.

(c) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative in the following bargaining units:

> All full-time and regular part-time physician assistants, computer training specialists, occupational therapists, physical therapists, registered nurses, physicians, psychologists, speech pathologists, audiologists, dieticians, social workers, assistant teachers, habilitation assistants, program assistants, administrative assistants, recreation assistants, social worker assistants, certified occupational therapy assistants, physical therapy assistants, licensed practical nurses, custodians, and supportive employment specialists employed by the Employer at its 160 and 175 Lawrence Avenue, Brooklyn, NY facilities, excluding all other employees including confidential employees, office clerical employees, managerial employees, supervisory employees and guards.
>
> All full-time and regular part-time Senior Residential Program Specialists, Residential Program Specialists, Cooks, Housekeepers, Licensed Practical Nurses, Administrative Assistants, Physical Therapist Assistants, excluding all other employees including Managerial Employees, Confidential Employees, Supervisors, and Guards, as defined by the Act.

(d) Within 14 days after service by the Region, post at its Lawrence Avenue and Residences locations, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2005.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 27, 2006

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Robert J. Battista, Chairman

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Wilma B. Liebman, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT make unilateral changes to the following terms and conditions of employment which differ from those set forth in the 2003–2005 collective-bargaining agreements: (1) vacation scheduling policy; (2) floating holidays; (3) involuntary schedule changes; (4) vacancy posting; (5) involuntary transfers; (6) discipline or discharge for cause; (7) grievance and arbitration procedures; (8) employees' access to their personnel files; (9) separation from employment; and (10) documentation of absences.

WE WILL NOT reserve to ourselves the right to make future changes in terms and conditions of employment without notice to or bargaining with the Union.

WE WILL NOT deal directly with our unit employees with respect to their terms and conditions of employment as long as they are represented by the Union, Local 2, United Federation of Teachers, American Federation of Teachers, AFL–CIO, for the purpose of collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, at the Lawrence Avenue and Residences locations, rescind the entire employee handbook designated for the Respondent's unionized employees.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any statements signed by employees in which they agree to comply fully with the policies and procedures in the handbook and acknowledge that we may revise such policies without prior notice, and WE WILL, within 3 days thereafter, notify employees in writing that this has been done and that the statements will not be used against them in any way.

WE WILL, before implementing any changes in wages, hours or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative in the following bargaining units:

All full-time and regular part-time physician assistants, computer training specialists, occupational therapists, physical therapists, registered nurses, physicians, psychologists, speech pathologists, audiologists, dieticians, social workers, assistant teachers, habilitation assistants, program assistants, administrative assistants, recreation assistants, social worker assistants, certified occupational therapy assistants, physical therapy assistants, licensed practical nurses, custodians, and supportive employment specialists employed by us at our 160 and 175 Lawrence Avenue, Brooklyn, NY facilities, excluding all other employees including confidential employees, office clerical employees, managerial employees, supervisory employees and guards.

All full-time and regular part-time Senior Residential Program Specialists, Residential Program Specialists, Cooks, Housekeepers, Licensed Practical Nurses, Administrative Assistants, Physical Therapist Assistants, excluding all other employees including Managerial Employees, Confidential Employees, Supervisors, and Guards, as defined by the Act.

UNITED CEREBRAL PALSY OF NEW YORK CITY

Nancy Reibstein, Esq., for the General Counsel.
Glenn Rickles, Esq., for the Respondent.
Angela Pace, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. Upon charges filed by Local 2, United Federation of Teachers, American Federation of Teachers, AFL–CIO (the Union), unfair labor practice charges were filed against United Cerebral Palsy of New York City (Respondent). A complaint issued on June 16, 2005 alleging that Respondent violated Section 8(a)(1) and (5) of the Act by unilateral changes in connection with collective-bargaining agreements between the Union and Respondent. The complaints were amended during the trial of this case on August 17, 2005 in Brooklyn, New York.

Briefs were filed by counsel for the General Counsel and by counsel for Respondent. Based upon the entire record in this case, I make the following findings of fact and conclusions of law.[1]

At all material times, Respondent, a domestic corporation, with its principal office and place of business located at 80 Maiden Lane, New York, New York, and with treatment facilities in various locations including those located at 160 and 175

[1] Respondent called Alan Seiler, director of human resources for Respondent as a witness. He testified briefly as to the issuance of the present employee handbook and prior handbooks which had issued over the years.

Counsel for General Counsel objected on the grounds only the contents of the Union's collective-bargaining agreement and the contents of the present employee handbook were relevant. I sustained the objection. General Counsel introduced the collective-bargaining agreements in issue and Board certifications and Respondent introduced the employee handbook in issue.

Lawrence Avenue, Brooklyn, New York (the Lawrence Avenue facilities), and with residences in various locations in New York City (the Residences), is engaged in providing treatment and other services to people with cerebral palsy and other disabilities. During the past year, which period is representative of its annual operations generally, Respondent, in the course and conduct of its business operations described above, purchased and received at its Brooklyn facilities products, goods, and materials valued in excess of $5000 directly from points located outside the State of New York.

During the past year, which period is representative of its annual operations generally, Respondent, in the course and conduct of its business operations described above, derived gross revenues in excess of $500,000.

It is admitted, that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

On August 21, 2000, after the conduct of an election, the Union was certified as the exclusive collective-bargaining representative of the following appropriate unit of Respondent's employees employed at its facilities located on Lawrence Avenue, Brooklyn, New York (the Lawrence Avenue unit):

> All full-time and regular part-time physician assistants, computer training specialists, occupational therapists, physical therapists, registered nurses, physicians, psychologists, speech pathologists, audiologists, dieticians, social workers, assistant teachers, habilitation assistants, program assistants, administrative assistants, recreation assistants, social worker assistants, certified occupational therapy assistants, physical therapy assistants, licensed practical nurses, custodians, and supportive employment specialists employed by the Employer at its 160 and 175 Lawrence Avenue, Brooklyn, NY facilities, excluding all other employees including confidential employees, office clerical employees, managerial employees, supervisory employees and guards.

On April 5, 2002, the Board certified the Union as the exclusive collective-bargaining representative of the following appropriate unit of Respondent's employees employed at its residential programs (the Residences unit);

> All full-time and regular part-time Senior Residential Program Specialists, Residential Program Specialists, Cooks, Housekeepers, Licensed Practical Nurses, Administrative Assistants, Physical Therapist Assistants, excluding all other employees including Managerial Employees, Confidential Employees, Supervisors and Guards, as defined in the Act.

On or about May 15, 2003, Respondent and the Union entered into collective-bargaining agreements covering the employees in the Lawrence Avenue and the Residences bargaining units. Article 3 of these agreements (effective date and duration) provides that the agreements were effective from May 15, 2003 through August 28, 2005.

Respondent Unilaterally Implements and Distributes an Employee Handbook to Lawrence Avenue and Residences Unit Employees

It is admitted that on or about April 1, 2005, Respondent unilaterally implemented and distributed an employee handbook to employees of both the Lawrence Avenue and Residences units.

Analysis and Conclusion

Counsel for General Counsel contends that Respondent violated Section 8(a)(1) and (5) of the Act by the issuance of an employee handbook to the employees of Respondent's Lawrence and Residences unit employees which contained alleged unilateral changes in the parties bargaining agreements.

Counsel for Respondent contends that the Board should defer such unilateral changes to arbitration, pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1931). Respondent contends that there is a legislative and court mandate to defer the case because the charge and complaint relates to alleged unilateral changes in an employee handbook which changes and alters certain provisions of the parties collective-bargaining agreement.

The practice of deferring to arbitration is founded on broad foundations. First, the courts having recognized a national policy of encouraging resolution of labor disputes through the grievance-arbitration machinery; second, that it is keeping with the statutory policy of the LMRA to encourage the parties to resolve such disputes through the "method agreed upon by the parties"; and third, that "disputes such as these can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by [the] Board of a particular provision of the [NLRA]." *Collyer*, 192 NLRB at 839.

Under *Collyer* and *United Technologies Corp.*, 268 NLRB 557 (1984), deferral is appropriate when the following factors are present: the dispute arose within the confines of a long and productive collective-bargaining relationship;[2] there is no claim of employer animosity to the employees' exercise of protected statutory rights; the parties' agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution. See also *Wonder Bread*, 343 NLRB No. 14, slip op. at 1 (2004); *University Moving & Storage Co.*, 2005 WL 2104289 (NLRB 2005).

Counsel for General Counsel contends that Respondent's unilateral changes, alleged in the complaint, amount to a rejection of the parties' collective-bargaining agreement.

Where there is no stable collective-bargaining relationship, or where the Respondent's conduct indicates a rejection of collective-bargaining and the organizational rights of employees, the Board will ordinarily not defer under *Collyer. North Shore Publishing Co.*, 206 NLRB 42 (1973). However, where there is "effective dispute-solving machinery available, and if the combination of past and present alleged misconduct does

[2] The collective-bargaining agreements in this case are initial agreements. Counsel for the General Counsel does not contend that this is an issue in the case.

not appear to be of such character as to render the use of the machinery uncompromising or futile." The Board will apply its "usual deferral policies." *United Aircraft Corp.,* 204 NLRB 879 (1972) (where occasional first-level supervisory misconduct does not outweigh the fact that the parties' agreed-upon grievance and arbitration machinery has worked fairly in the past).

This balancing test has weighed towards deferral in a line of cases where the employer had allegedly committed unfair labor practices. In *Postal Service,* 270 NLRB 1022, 1023 (1984), the General Counsel argued that deferral was not appropriate because after the parties settled a grievance by the employer's acceptance of the union's position on the grievance, the employer basically repeated his prior action. The General Counsel alleged that this constituted a rejection of basic collective-bargaining principles. The Board found, however, that the employer's action was not "a broad rejection of the applicability of the grievance-arbitration process." The Board also noted that "there is no contention that the parties are not continuing to process and resolve grievances on other matters." In *United Beef Co.,* 272 NLRB 66, 67 (1984), a grievance was filed alleging that a shop steward was harassed and discharged for processing grievances. The Board deferred to arbitration, citing language from *United Technologies* that this alleged misconduct "does not appear to be of such character as to render the use of [the grievance-arbitration] machinery . . . futile."

Deferral to arbitration has occurred in cases in which charges of illegal unilateral changes by employers have been filed. For example, in *Southwestern Bell Telephone Co.,*198 NLRB 569, 570 (1972), the Board overruled the trial examiner's decision that the employer's unilateral action precluded the arbitration process by finding that the "dispute arguably arises from the collective-bargaining agreement between the parties and that it should be submitted for resolution under the grievance and arbitration provisions set out therein." Furthermore, the Board has held *Collyer* prearbitral deferral of unfair labor practice charges challenging unilateral changes is appropriate even where no specific contractual provision's meaning is in dispute. See, e.g., *Inland Container Corp.,* 298 NLRB 715 (1990) (unilateral imposition of drug-testing program); *E. I. du Pont & Co.,* 275 NLRB 693 (1985) (unilateral changes in certain work schedules); *Standard Oil Co.,* 254 NLRB 32, 34 (1981) (fact that examination is not pinpointed in contracts as a conceded management prerogative is insufficient reason for disregarding proof, if any, that parties intended to permit employer to give such tests when appropriate).

In light of the presumption towards deferral to arbitration if it is part of the parties' collective-bargaining agreement, unfair labor practices, if effective grievance machinery is in place, this case should be deferred to arbitration.

Alleged Unfair Labor Practices—Unilateral Activities of Respondent

It is well-established Board law that it is a violation of Section 8(a)(5) of the National Labor Relations Act for an employer to unilaterally institute changes regarding matters that are subjects of mandatory bargaining under Section 8(d). *NLRB v. Katz,* 369 U.S. 736 (1962). Under *Civil Service Employees Assn.,* 311 NLRB 6 (1993), in order for the employer's unilateral action to be determined unlawful there must be "a material, substantial and significant change" in those terms in conditions. (See also *Murphy Diesel Co.,*184 NLRB 757 [1970]).

Respondent does not dispute that it unilaterally implemented and distributed an employee handbook on April 1, 2005, which is during the time that the agreements between the Respondent and the Union (covering the Lawrence Avenue and the Residences bargaining units) were in effect.

Respondent does dispute that the relevant provisions, which are alleged in the complaint, in the employee handbook constitute mandatory subjects of bargaining under Section 8(d). The General Counsel contends that the differences between the employee handbook and the collective-bargaining agreements were in the areas of vacation days, holiday leave, hours of work, vacancy posting, transfers in and out of units, disciplinary standards, grievance and arbitration procedure, personnel files, and separation from employment.

The General Counsel contends that the unilateral changes regarding vacation scheduling, floating holidays, hours of work, job postings, transfers, disciplinary standards, and the grievance and arbitration procedure all constituted subjects of mandatory bargaining under relevant Board precedent, and such unilateral changes establish a rejection of the collective-bargaining agreement.

The unilateral changes alleged are:[3]

1. Vacation scheduling has been held to constitute a subject of mandatory bargaining in *Migali Industries,* 285 NLRB 820, 825–826 (1987); see also *Blue Circle Cement Co.,* 319 NLRB 954, 960 (1995) (where "the Company's new restriction on its plant employees' freedom to schedule vacations was a substantial change affecting a condition of employment.").

2. Changing floating holidays has been held to be a mandatory subject of bargaining. *E. I. du Pont De Nemours & Co.,* 259 NLRB 1210, 1211 (1982). This was an issue in collective-bargaining negotiations.

3. Hours of work and work schedules have been held to be subjects of mandatory bargaining in a long line of Board cases, including *Carpenters Local 1031,* 321 NLRB 30, 31 (1996); and *Sheraton Hotel Waterbury,* 312 NLRB 304, 307 (1993), in which the Board held specifically that changes in employees' hours of work are mandatory subjects of bargaining.

4. Elimination of job postings have been held to be a subject of mandatory bargaining in *Beverly Health & Rehabilitation Services,* 335 NLRB 635, 656 (2001) (where "failing to post a new . . . position" was considered a term or condition of employment).

5. Changes regarding transfers have been held to be subjects of mandatory bargaining under *Southwestern Bell Telephone Co.,* 247 NLRB 171, 173 (1980) (where "Inplant promotions . . . and transfers, as well as nondiscrimination provisions, are mandatory bargaining subjects.)

6. Changes to the disciplinary standards are found to be mandatory subjects of bargaining. See *Toledo Blade Co.,* 343 NLRB No. 51, slip op. at 5 (2004); see also *Migali Industries,*

[3] These violations are alleged specifically in the complaint.

285 NLRB 820, 821 (1987) (progressive discipline system held to be mandatory subject of bargaining*); Electri-Flex Co.*, 228 NLRB 847 (1977) (written warning system of discipline held to be mandatory subject of bargaining).

7. Changes in the grievance and arbitration procedures have also been held to be mandatory subjects of bargaining. See, e.g., *U.S. Gypsum Co.*, 94 NLRB 112 (1951); *Electrical Workers UE v. NLRB*, 409 F.2d 150 (D.C. Cir. 1969), enfd. 164 NLRB 563 (1967).

I find these unilateral changes are not sufficient to establish a rejection of the collective-bargaining agreements in issue.

The most troubling unilateral change is the handbook's grievance provision. Respondent inserted in its handbook, two preconditions before applying the grievance procedures as set forth in the parties' collective-bargaining agreement. These preconditions are that (1) the employees must discuss with their immediate supervisors any questions or complaints, and (2) if not satisfied, the employee should then talk to their program director. If the grievance is not resolved, then the employees can file a grievance with the Union pursuant to the grievance procedure set forth in the parties' collective-bargaining agreement.

This unilateral change is troubling because the employees must try to resolve their grievance, as set forth above, without union participation, and before a formal grievance can be filed with the Union. However, an employee still has the ultimate right to invoke the contractual grievance procedures. I find Respondent's unilateral change in the grievance procedure troubling, but not sufficient to establish a rejection of the collective-bargaining agreement for the reasons set forth above.

Counsel for the General Counsel also contends that a handbook provision requiring that employees may be asked to submit medical documentation for any absence due to illness, and non-medical documentation for nonmedical absences is violative of Section 8(a)(1) and (5) of the Act, and evidence of a rejection of the collective-bargaining agreement.

In view of the broad scope of *Collyer*, I find this unilateral change does not amount to a rejection of the *Collyer* doctrine for the reasons set forth above.

The General Counsel further contends that Respondent had the right to change and or eliminate employees' terms and conditions at any time, and without advanced notice. Specifically, the handbook states in relevant part:

> UCP/NYC's personnel policies, practices and benefits are periodically reviewed and are subject to change. The Agency may change, cancel or suspend any of its personal policies at anytime without advance notice, although where and when practical, UCP/NYC will notify employees of significant changes through Administrative Memoranda or by another means. However, no individual supervisor or administrator may independently alter the personnel practices described in the Handbook.

Additionally the handbook states:

> I realize that it is my responsibility to become familiar with the Handbook, to comply fully with the policies and procedures contained in the Handbook and that such policies may be revised from time to time, with or without prior notice to me. I further realize that if there is a conflict between one or more Agency policies, the most recently issued policy will apply.

I find such unilateral change is within the scope of *Collyer* and I find it is not sufficient to establish a rejection of the collective-bargaining agreement for the reasons set forth above.

Counsel for the General Counsel relies on *Heck's, Inc.*, 293 NLRB 1111 (1989), to establish that the above unilateral changes should not be deferred because they establish a rejection of the parties' collective-bargaining agreement.

Heck's is a case involving two facilities, a union facility and a nonunion facility. In this connection the Board stated:

> The consolidated amended complaint alleges that certain conduct of the Respondent was unlawful at both of the Respondent's facilities involved in this case: Its unionized retail store in Wheeling and its non-unionized warehouse in Nitro. Thus, only some of the issue[s] before us could be deferred to the contractual "Dispute Procedure" in effect at the Wheeling location. Because we must determine at least a part of the instant dispute, there is no compelling reason for deferring other aspects of the dispute to the grievance arbitration machinery at Wheeling, and we decline to do so.

Thus, I find a reliance on *Heck's* is inapplicable to the alleged unilateral changes in the instant case.

In conclusion I find, that in the instant case there are no impediments to deferral. I also find that deferral will fulfill the Act's mandate to foster the practice and procedure or collective bargaining.

CONCLUSIONS OF LAW

1. At all times material herein Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent and the Union are parties to collective-bargaining agreements with the Residences facility concerning an appropriate unit within the meaning of Section 9(c) of the Act:

> All full-time and regular part-time Senior Residential Program Specialists, Residential Program Specialists, Cooks, Housekeepers, Licensed Practical Nurses, Administrative Assistants, Physical Therapist Assistants, excluding all other employees including Managerial Employees, Confidential Employees, Supervisors and Guards, as defined in the Act.

and with the Lawrence Avenue unit covering:

> All full-time and regular part-time physician assistants, computer training specialists, occupational therapists, physical therapists, registered nurses, physicians, psychologists, speech pathologists, audiologists, dieticians, social workers, assistant teachers, habilitation assistants, program assistants, administrative assistants, recreation assistants, social worker assistants, certified occupational therapy assistants, physical therapy assistants, licensed practical nurses, custodians, and supportive employment specialists employed by the Employer at its 160 and 175 Lawrence Avenue, Brooklyn, NY facilities,

excluding all other employees including confidential employees, office clerical employees, managerial employees, supervisory employees and guards.

4. This case should be deferred pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971).

REMEDY

Jurisdiction of this proceeding is retained for the limited purpose of entertaining an appropriate and timely motion for further consideration on the proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision, been either resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result that is repugnant to the Act.

Dated, Washington, D.C. December 7, 2005